STATE'S RESPONSE TO MOTION FOR DISCOVERY – Victims' Rights

The defense cannot circumvent a victim's right to refuse a defense interview by alleging a "substantial need" for the information. The defense has no right to interview Victim Witness Advocates about what the victim told them.

The State of Arizona, by and through undersigned counsel, opposes the defendant's motion for discovery of privileged information in possession of the Maricopa County Attorney's Victim Witness Advocate and/or the City of Glendale's Victim Assistance Caseworker, pursuant to the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Defense counsel has requested that the Court allow the defense to interview both Anne Marreel, a Victim Witness Advocate from the Maricopa County Attorney's Office, and Mike Eyer, a Victim Assistance Caseworker from the City of Glendale. Neither Ms. Marreel nor Mr. Eyer has any knowledge of any evidence that would be material or relevant to the case. Allowing the defense to interview them would, in effect, permit defense access to the victim, which is precluded by the Victims' Bill of Rights. In this response, the State will refer to both Ms. Marreel and Mr. Eyer as Victim Witness Advocates.

A. The Victims' Bill of Rights will not allow the defense to interview the victim even if the defense is unable to obtain the requested information or the substantial equivalent without undue hardship.

On November 6, 1990, Arizona voters approved an amendment to the Arizona Constitution that became effective on November 26, 1990. This amendment, Article 2, Section 2.1 of the Arizona Constitution, is the Victims' Bill of Rights. That section provides in part:

> Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:
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> > 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

That constitutional protection is implemented by A.R.S. § 13-4433(A):

> Unless the victim consents, the victim shall not be compelled to submit to an interview on any matter, including a charged criminal offense witnessed by the victim that occurred on the same occasion as the offense against the victim, that is conducted by the defendant, the defendant's attorney or an agent of the defendant.

The Arizona Supreme Court has stated that the victim's right to decline a defense interview is "absolute." *State v. Roscoe*, 185 Ariz. 68, 74, 912 P.2d 1297, 1303 (1996). The defense is not entitled to be present during interviews between the victim and the prosecution, either in person or by proxy. In *State v. O'Neil*, 172 Ariz. 180, 836 P.2d 393 (1991), the victims exercised their right to refuse pretrial defense interviews. The prosecution then set up interviews with the victims. The defense asked for an order allowing defense counsel to attend the prosecution's interviews, claiming that the defense needed that information and that the information was not available through other means. The trial court refused to allow defense counsel to attend the interviews, but ordered the State to "record all statements of the victims to the prosecutor, formal or otherwise, and to provide defense counsel with copies of the transcripts of those conversations." *Id*. at 282, 836 P.2d at 394. The Court of Appeals held that the trial court abused its discretion by ordering the prosecutor to make such recordings. The Court noted that although Rule 15.1(3), Ariz. R. Crim. P., requires the State to provide the defendant with the "relevant written or recorded statements" of witnesses, "that does

not mean that the state is required to make a recording any time its representatives speak with a witness." *Id*. The Court held:

> To apply Rule 15.1(e) as the trial court has apparently done enables the defendant to make an end run around the constitutional right conferred upon victims to refuse any discovery requests by, in essence, permitting him to obtain an interview of the victims through the prosecutor.

O'Neil, 172 Ariz. at 181-182, 836 P.2d at 394-95. The Court further stated that requiring the State to record all conversations with victims would infringe on the victims' rights to confer with the prosecutor. The court reasoned that the intent of the Victims' Bill of Rights was that prosecutor-victim conferences "be conducted in an atmosphere that is unconstrained, certainly not intimidating, and one that encourages a victim to speak freely." Citing *State v. Warner*, 168 Ariz. 261, 812 P.2d 1079 (App.1990), the Court concluded, "After *Warner*, it should be clear that the Victims' Bill of Rights abrogated a defendant's right under Rule 15 to interview or otherwise seek discovery from an unwilling victim." *O'Neil*, 172 Ariz. at 182, 836 P.2d at 395.

In *Knapp v. Martone*, 170 Ariz. 237, 823 P.2d 685 (1992), the Arizona Supreme Court emphasized that Arizona courts must follow and apply the plain language of the new amendment to the constitution.

> If trial courts are permitted to make ad hoc exceptions to the constitutional rule based upon the perceived exigencies of each case, the harm the Victims' Bill of Rights was designed to ameliorate will, instead, be increased. Permitting such ad hoc exceptions will encourage defendants or others to assert that the person designated as the victim should, instead, be considered a suspect.

170 Ariz. at 239, 823 P.2d at 687.

In this case, the victim has not yet decided whether she will submit to a defense interview. If the victim chooses not to participate in an interview, the defense should not be permitted to make an "end run" around the Victims' Bill of Rights by interviewing the Victim Witness Advocates. This Court should therefore deny the defense request to interview the Victim Witness Advocates.

B. Testimony from the Victim Witness Advocates would not be material or necessary to provide an adequate defense and is therefore not discoverable under Rule 15.3(a)(2).

The Victims' Bill of Rights precludes the trial court from ordering the deposition of a victim who has indicated an unwillingness to be interviewed, but the court does retain the power to order that other material witnesses be deposed in certain circumstances. *Day v. Superior Court*, 170 Ariz. 215, 217, 823 P.2d 82, 84 (App. 1991). Thus, although the trial court's authority is limited by the Victims' Bill of Rights, Rule 15.3 is not abrogated. *Day*, *id*.

Rule 15.3(a)(2), Ariz. R. Crim. P., requires some showing by the party seeking discovery that the person's testimony "is material to the case or necessary adequately to prepare a defense or investigate the offense." *State ex rel. Berger v. Superior Court*, 21 Ariz. App. 320, 323, 519 P.2d 73, 76 (1974). Rule 15.3 "was not designed to permit a tour of investigation in wishful anticipation that helpful evidence will appear." *Berger*, 21 Ariz. App. at 323, 519 P.2d at 76. In *Berger*, the defendants sought to depose a police chief who had no personal knowledge of the events in the case and did not participate in the investigation. The Court of Appeals found that the defendants failed to establish the necessary showing under Rule 15.3(a)(2) and that thus they were not entitled to depose the chief. *Id*.

General allegations that the nature of the defense requires a victim interview are insufficient to overcome the Victims' Bill of Rights. In *State ex rel. Romley v. Hutt,* 195 Ariz. 256, 987 P.2d 218 (App. 1999), the defense argued that it needed to question the victim to develop its theory that the victim allowed the defendant to take the victim's car. The trial court ordered a pretrial hearing, finding that it would effectively deny the defendant her defense if she could not develop impeachment material at a preliminary hearing. *Id*. at 258 ¶ 4, 987 P.2d at 220. The State sought relief and the Court of Appeals reversed, noting that "confrontation rights under the Sixth Amendment do not normally afford criminal defendants a right to pretrial discovery." *Id*. at 260 ¶ 7, 987 P.2d at 222. The Court concluded:

> Victims are often important, crucial, and even critical witnesses. It is no doubt a sound practice for lawyers to interview witnesses before trial. But to compel victim interviews based on the kind of generic considerations presented here would nullify a significant constitutional protection afforded crime victims.

Id. at 223 ¶ 9, 987 P.2d at 223.

In this case, as in *Berger*, *supra*, the Victim Witness Advocates have no personal knowledge of the events in the case and did not participate in its investigation. The Victim Witness Advocates, therefore, cannot possibly have any knowledge that would be at all material to the defendant's case or necessary to prepare an adequate defense. The defense is, in effect, attempting to use the Victim Witness Advocates as its tape recorder to repeat the victim's statements, hoping thereby to be vicariously present at the victim's interview. The Victims' Bill of Rights prohibits the defense from making such demands on crime victims.

The Victim Witness Advocates are primarily responsible for providing the victim with information about how the criminal justice system works and what kinds of social services are available. The Advocates also provide general assistance to the victim so that she can cope emotionally with her situation. The Victim Witness Advocates do not question the victim or the prosecuting attorney about the case and do not encourage the victim to discuss the particulars of the case. The Victim Witness Advocates never work with the prosecuting attorney in preparing the case. The only information that the Victim Witness Advocates could possibly have for the defense counsel would be information from the victim herself – her own thoughts, feelings, emotions, and beliefs. Interviews of the Victim Witness Advocates cannot be necessary for the defense to prepare an adequate defense case, considering the extremely limited nature of the Advocates' knowledge of the case. Therefore, the defense should not be permitted to go on a "fishing expedition" and interview the Victim Witness Advocates, so this Court should deny the defense's discovery request.

CONCLUSION:

For the foregoing reasons, the State respectfully requests this Court to deny the defendant's Motion for Discovery.